

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Communications Services for)	CG Docket No. 11-41
)	
Native Nations)	
)	

COMMENTS

Of the

Council for Native Hawaiian Advancement

I. Introduction

The Council for Native Hawaiian Advancement (“CNHA”) hereby submits these comments in response to the Notice of Inquiry in the Matter of Improving Communications services for Native Nations.

Founded in 2001, CNHA is a national network of over 150 Native Hawaiian Organizations dedicated to enhancing the cultural, economic, and community development of Native Hawaiians. CNHA delivers its mission through the administration of the Native Hawaiian Policy Center, operation of a Native CDFI Loan Fund, provisions of Capacity-Building and Community Initiatives, and coordination of the Annual Native Hawaiian Convention in Hawaii each year. CNHA is most comparable to other Native organizations such as the National Congress of American Indians and the Alaska Federation of Natives. These comments are submitted based on consultation and convening with CNHA organizational members, with a particular emphasis

on CNHA member organizations that have elected leaders by Hawaiian Home Land beneficiaries as defined under the Hawaiian Homes Commission Act, due to the significant relevance and similarity to trust lands and allotment lands of American Indians and Alaska Natives.

II. Hawaiian Homes Commission Act of 1920

In 1921, relying in part on the precedent of the General Allotment Act, which provided individual lands for American Indians under Federal protections, Congress passed the Hawaiian Homes Commission Act of 1920¹. The purpose of the Act was to rehabilitate the Native Hawaiian people by setting aside for Native Hawaiian Settlement and agricultural use 200,000 acres of the ‘Ceded’ lands, i.e., the former Crown and public lands of the Kingdom of Hawaii that had been ceded to the United States upon annexation. The legislative history of the Act makes clear that Congress considered Native Hawaiians to be Hawaii’s indigenous peoples, and sought to extend towards Native Hawaiians, federal policies similar to that of American Indians and Alaska Natives.

Mr. WISE [Senator John Wise, Territorial Legislature]. The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them. We are not only asking for justice in the matter of division of the lands, but we are asking that the great people of the United States should pause for one moment and, instead of giving all your help to Europe, give some help to the Hawaiians and see if you can not rehabilitate this noble people.

¹ Hawaiian Homes Commission Act, ch. 42, §101, 42 Stat. 108 (1920).

Secretary LANE [Secretary of the Interior Lane]. One thing that impressed me there was the fact that the natives of the islands, who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty. . . . [T]hey are a problem now and they ought to be cared for by being provided with homes out of the public lands; but homes that they could not mortgage and could not sell.

(House Committee on Territories, Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii and on the Proposed Transfer of the Buildings of the Federal Leprosy Investigation Station at Kalawao on the Island of Molokai to the Territory of Hawaii, H.R. Doc. No. 839, 66th Cong., 2d Sess. at 4 (1920)).

As a condition of the Hawaii Statehood Act in 1959, the State of Hawaii agreed to administer the Hawaiian Homes Commission Act, and in 1960, the state agency, Department of Hawaiian Home Lands (DHHL) was created to administer the Hawaiian Home Lands program and to manage the Hawaiian Home Lands trust, with federal oversight. Similar to the Bureau of Indian Affairs (BIA) at the federal level, the state DHHL is mandated at the state government level to manage the Hawaiian Home Lands trust. DHHL is headed by an Executive Board, the Hawaiian Homes Commission, composed of nine members who are appointed by the Governor of Hawaii and confirmed by the Hawaii State Senate.

The United States maintained its federal trust responsibility which requires United States consent to certain amendments made to the Hawaiian Homes Commission Act. Congress has subsequently acknowledged and reaffirmed this trust responsibility in various statutes². The

² 42 U.S.C. §11701(20) (“United States has also recognized and reaffirmed the trust relationship to the Hawaiian people through legislation”), and 20 U.S.C. § 7512(12) (b) (“because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.”)

United States affirmed its position in its brief³ filed by the United States Department of Justice before the United States Supreme Court in the case of *Rice v. Cayetano*⁴.

The Hawaiian Homes trust lands are located in non-contiguous parcels throughout the State of Hawaii, with the majority of homestead communities located in remote, rural areas of the state. In enacting this statute, Congress intended to “rehabilitate” Native Hawaiians through the award of land for residential, pastoral, or agricultural homesteading, very similar to land allotments described in the General Indian Allotment Act of 1906. Despite the fact that ninety years have passed since the enactment of the Hawaiian Homes Commission Act, there is still an extensive waiting list for residential, pastoral, or agricultural homestead land requests. According to the State of Hawaii DHHL 2009 Annual Report, the Department had 8238 residential leases awarded with 20,122 beneficiaries on the residential waiting list. Similarly, the report shows 1102 Agricultural leases awarded with 17,116 beneficiaries on the agricultural lease waiting list and 408 pastoral leases awarded with 2846 beneficiaries on the pastoral lease waiting list⁵.

Hawaiian Homestead Associations

Section 204 of the Hawaiian Homes Commission Act establishes a preference for DHHL to negotiate with an “organization or association controlled by native Hawaiians, for commercial, industrial or other business purposes” for a general lease of the lands prior to negotiating such a lease with the general public.⁶ Similarly, in addition to authorizing leases to native Hawaiians,

³ Brief for the United States as Amicus Curiae Supporting Respondent, *Rice v. Cayetano*, 527 U.S. 1061 (1999) (No. 98-818) (“Congress has concluded that it has a trust obligation to Native Hawaiians.”) 1999 WL 569475 at *10.

⁴ *Rice v. Cayetano*, 527 U.S. 1061 (1999)

⁵ Dep’t of Hawaiian Homelands, Annual Report, 26 (2009), <http://hawaii.gov/dhhl/publications/annual-reports/FY2009%20Annual%20Report.pdf/>.

⁶ Hawaiian Homes Commission Act, ch. 42, § 204(a)(2), 42 Stat. 108 (1920).

Section 207 of the Hawaiian Homes Commission Act authorizes DHHL to grant licenses for mercantile establishments owned by “native Hawaiians and organizations formed and controlled by native Hawaiians.”⁷

Organizations “controlled by native Hawaiians” have been formed by the beneficiaries of the HHCA and have existed for decades, representing geographical homestead areas across the state. There are currently over 30 homestead associations that have democratically elected leaders representing the interests of beneficiaries eligible for lands under the HHCA. Native Hawaiians who meet the definition under the HHCA are “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”⁸ and are often referred to as Hawaiian Home Land beneficiaries. As such, beneficiaries and organizations formed and controlled by them, when compared to the federal system, would be synonymous with tribal members and tribal governments.

Hawaiian Homestead Association, organizations formed and controlled by Hawaiian Home Land beneficiaries with democratically elected leadership, are recognized by the state DHHL in the implementation of Section 204 and 207 as represented in dozens of negotiated land instruments. DHHL continues to rely on these organizations as representative bodies similar to the federal government’s reliance on Pueblos, Colonias and Tribes to represent the interests of tribal members.

⁷ Hawaiian Homes Commission Act, ch. 42, §207(c)(1)(b), 42 Stat. 108 (1920).

⁸ Hawaiian Homes Commission Act, ch. 42, §201, 42 Stat. 108 (1920).

The Federal Communications Commission has appropriately included Hawaiian Home Lands and as a result, the Hawaiian Home Land Beneficiaries in its Notice of Inquiry to determine how to improve communication services for Native Nations and Native communities.

III. Native Nations Priority

The Notice of Inquiry seeks comments on whether a Native Nations' priority should be adopted. CNHA supports the Federal Communications Commission's interest in providing priority to Native communities, including Hawaiian Homelands, to improve communications services. The United States has a legal and political relationship with Native nations based on the historical relationship with these nations and Native peoples. As noted above, the United States has acknowledged and recognized Native Hawaiians as the aboriginal, indigenous peoples of Hawaii, and therefore, of the United States. The United States has acknowledged its responsibility to provide for the welfare of Native peoples, including Native Hawaiians. While the Hawaiian Homes trust is administered by the state DHHL, the trust retains its federal nexus through the requirement of consent by the United States for certain amendments that impact the trust and those eligible for leases of the trust lands⁹. Native Hawaiians, therefore, should be included in federal policies intended to address the conditions of Native peoples. Federal policies addressing conditions on Native trust lands should include the Hawaiian Home Lands trust.

In applying such priority to projects on Hawaiian Home Lands, CNHA requests that the Commission consider making applications submitted by Hawaiian Homestead Associations

⁹ Admission of Hawaii to Union Act of March 18, 1959, §4, P.L. 86-3, 73 Stat. 4.

eligible for priority consideration in providing for communications services. As stated above, Hawaiian Homestead Associations are organizations formed and controlled by beneficiaries with leaders who are democratically elected. Hawaiian Homestead Associations are comprised of Native Hawaiians that live in specific homestead trust land areas or are on the waiting list for a land award, are most aware of the challenges and needs in the homestead trust land areas, and are best situated to determine appropriate solutions to address such needs and challenges. Hawaiian Homestead Associations interact with the state DHHL in the way that tribes interact with the Bureau of Indian Affairs, and as such, are best situated to facilitate the improvement of communications in their communities, which are non-contiguous throughout the State of Hawaii. In addition, the federal policy of self determination is part and parcel to the tenets of the Hawaiian Homes Commission Act, and the trust responsibility of the state DHHL to the beneficiaries of this land trust.

The Commission, in *Rural Radio Order*¹⁰, established a tribal priority in allocating and assigning broadcast radio channels and limited eligibility for tribal priority to federally recognized tribes. The Notice of Inquiry requests commentary on whether such priority should be applied to Hawaiian Home Lands. CNHA believes it can and should be applied to Hawaiian Home Lands which are included in the definition of “tribal lands” in the FCC’s *Rural Radio Tribal Priority Order*.¹¹ Hawaiian Homestead Associations are well established representative governing organizations of beneficiaries of Hawaiian Home Lands, and enjoy recognition as such by the

¹⁰ *Promoting Rural Radio Service and Streamlining Procedures*, MB Docket No. 09-52, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, FCC 11-28 (rel. Mar. 3, 2011) (*Rural Radio Tribal Priority Order*), 24 FCC Rcd. 5239 (F.C.C. April 20, 2009).

¹¹ Footnote 13, 26 FCC Rcd 2556 (March 13, 2011).

state DHHL. Therefore, CNHA respectfully requests that the Commission extend any tribal priority status to applications submitted by Hawaiian Homestead Associations for projects on Hawaiian Home Lands.

The Notice of Inquiry requests the identification of public interest benefits from additional Native Nation priorities. Improved communications services for homestead communities will inevitably increase economic empowerment and self determination in homestead communities. With increased communication services, businesses can be developed in homestead communities to employ and serve homestead residents and the larger state. One example of this is Hawaiian Homestead Technologies (HHT), a social enterprise owned by CNHA and operated in Hawaiian Home Land areas. HHT is a member of the InterTribal Information Technology Corporation (IITC), a consortium of 13 Native companies owned by Tribes, Alaska Native Corporations, and Native Hawaiian Organizations. HHT is based in the Anahola homestead and has trained and employed 57 homestead beneficiaries in XML, SGML, and CAD, and upon certification, are hired to work to digitized documents in their homestead areas. HHT has successfully completed numerous contracts converting technical manuals and other data into electronic formats that can be accessed across platforms by every branch of the U.S. Armed Services. The contracts performed by HHT included the technical manuals for E-2C Hawkeyes; H-1 and Apache Helicopters; B-52, C123B, C-130AD and C-27A aircraft; and numerous other tanks, vehicles, and military systems. These services were made possible due to the fiber optic system installed by Sandwich Isles Communications to serve Hawaiian Home Lands. HHT is a prime example of the type of empowerment and economic growth that can be achieved in homestead communities upon access to improved communication services.

According to a Beneficiary Survey conducted by the state DHHL in 2009, 51% of Hawaiian homestead households are below the 80% HUD Median Income guidelines. Similarly, according to the 2006 Office of Hawaiian Affairs Databook, a large percentage of DHHL applicants are below the 80% HUD Median Income Guidelines: 59% on Lanai; 75% on Molokai; 62.7% on Kauai, 54.5% on Hawaii island; 58.2% on Maui and 55.1% on Oahu, resulting in an average of 56% statewide¹².

The public interest will be served by a policy that grants priority to applications submitted by Hawaiian Homestead Associations for projects on Hawaiian Home Lands by increasing opportunities economic development in homestead communities resulting in job creation, which expands the local economic base, and is vitally important in today's economy. And finally, inclusion of Hawaiian Homestead Associations and Hawaiian Home Lands under the Native Nations Priority, furthers the trust responsibility to promote self determination and self-sufficiency.

IV. Native Nations Broadband Fund

The Notice of Inquiry seeks comment on whether a Native Nations Broadband fund is necessary. CNHA supports the establishment of a Native Nations Broadband Fund to support sustainable broadband deployment to improve communication services for Native communities and trust land areas to provide:

¹² Office of Hawaiian Affairs, Databook, 139 (2006).

- (1) technical and financial assistance for regulated service launch to help native governments and communities to assess and plan regulated and broadband services;
- (2) support administrative and operational costs in High-Cost areas to help native communities sustain key broadband and infrastructure service in their communities;
- (3) connect both “under” and “unserved” native areas to assist native communities in attaining parity of service and technology through regulated support;
- (4) sustain current tribal regulatory services – the safety net support which helps tribal governments to continue with regulatory telecommunications to their communities;
- (5) native broadband Lifeline and Linkup Fund to help native consumers to be able to afford residential broadband service;
- (6) native public safety support to ensure appropriate public safety responses in life and death situations;
- (7) native broadband mapping for native governments to help native governments and communities to attain essential data for broadband deployment and public-safety planning;
- (8) connect key native public institutions to help native governments and communities to connect critical public institutions to broadband;
- (9) support native mass media universal access to help native governments to provide essential public and local information to native residents; and
- (10) safety-net broadband mobility network to help native governments and communities to supplement the lack of infrastructure, broadband, or public safety networks with a broadband mobility safety-net 911 access network.

The establishment of a Native Broadband Fund is necessary to address the needs as outlined above and originally proposed by the National Tribal Telecommunications Association.

In addition, CNHA recommends coordination by the FCC with other established federal capital sources to leverage the Native Broadband Fund. For example, the New Market Tax Credits program, created in 2000 and administered by the U.S. Treasury Department's Community Development Financial Institution (CDFI) fund, delivers \$3 billion annually in capital incentives through tax credits to individuals and corporations to make investments in distressed communities across the country. Eligibility for the program is largely limited to qualified census tracts based on median income levels. CNHA suggests that eligibility for the program be modified so that trust lands as defined by the Substantially Undeserved Trust Areas (SUTA)¹³ definition incorporated in the 2008 Farm bill are automatically eligible for the New Market Tax Credits. We further recommend that 3 percent of the annual NMTC allocation be directed to trust land areas which will increase the availability of capital investment to trust land areas for economic growth built on improved telecommunication services in these same areas.

V. Native Nations Business Models

The Notice of Inquiry requests comments on the basic tools Native Nations need in order to effectively build sustainable business and deployment models to address the significant communication infrastructure needs and market challenges on native lands. CNHA supports

¹³ The referenced definition of trust lands is codified at 38 USC §3765(1): "trust land" signifies any land that is held in trust by the United States for Native Americans; is subject to restrictions on alienation imposed by the United States on Indian Lands (including Hawaiian Homelands); is owned by a Regional Corporation or a Village Corporation, as defined by the Alaska Native Claims Settlement Act (43 U.S.C. §1602); or is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary.

business models that empower and promote the economic self determination of Native communities, especially as opportunities are made possible through the improvement of communication services. For this reason, eligibility and involvement of Hawaiian Homestead Associations for projects on Hawaiian Home Lands is essential and critical at all stages of development, construction, and operations and maintenance. This inclusion and approach ensures that Hawaiian Home Land beneficiaries are at the forefront of potential economic opportunities and are working directly with government officials, financiers, and project developers. CNHA further recommends that consultation be a requirement by state and federal agencies when telecommunication systems and services are being made available in trust land areas.

VI. Native Nations Adoption and Utilization

The Notice of Inquiry seeks comment on the challenges faced by Native Nations in achieving broadband adoption and utilization, and specifically if the National Broadband Plan represents a comprehensive assessment of barriers to adoption and utilization of broadband on tribal lands and on Hawaiian Home Lands. The National Broadband Plan is a comprehensive document that is intended to lay out a strategy for the entire nation to improve access to broadband. While Native communities are mentioned in the plan, the National Broadband Plan does not contain a comprehensive analysis which enumerates the multitude of challenges faced by Native communities in improving access to broadband. In many instances these Native communities face challenges even to access traditional telecommunications such as landline phone service. As the Commission moves forward with its plans to implement its Congressional mandate on access to broadband, it is imperative that the Commission fully understand the impact of policy

changes on isolated, rural areas, and take the necessary steps to ensure that services to these areas are maintained and not jeopardized. CNHA urges the Commission to carefully examine how the proposed implementation of the Connect American Fund and the proposed modifications to the Universal Service Fund will impact isolated, rural areas that are dependent on programs such as LinkUp, Lifeline, E-rate, and rural health care programs.

The Notice of Inquiry seeks comment on the role of anchor institutions such as schools and medical facilities, in facilitating the deployment, adoption, and utilization of broadband in native communities as well as the appropriate role of government in spurring sustainable broadband adoption. CNHA supports coordinated approaches towards utilizing federal funding opportunities and supports an increased role by Hawaiian Homestead Associations as anchor institutions partnering with schools, libraries, and health care facilities in the deployment and subsequent adoption and utilization of broadband on Native trust lands. Given the geographic isolation of the State of Hawaii, and the further difficulties due to the non-contiguous nature of the lands that make up the Hawaiian Home Lands trust, it is a necessity to coordinate efforts to ensure access to information and funding opportunities. Telemedicine and video-teleconferencing capabilities are important in Hawaii given the geographic isolation of the Hawaiian Islands.

The Notice of Inquiry seeks comment on the role of public-private partnerships involving the federal government, native government, non-profit community and private industry partners in supporting widespread broadband adoption. Given the challenges regarding access to capital, CNHA welcomes the opportunity to create public-private partnerships to improve

communications services in Native communities. Hawaiian Homestead Associations will continue to play a vital role in the planning and implementation of policies and projects affecting their communities.

Access to information is also a challenge for a state as geographically isolated as Hawaii. The federal government, even while constrained by fiscal limits, has a wealth of knowledge that can be shared with Native governments and communities. Facilitating alliances between businesses and Native communities and governments which lead to successful public-private partnerships is an important role for the federal government.

VII. Defining Tribal Lands

The Notice of Inquiry seeks comment on the definition of tribal lands and whether a single definition should be considered by the FCC for all communications-related regulations. CNHA supports the definition of tribal lands that includes Hawaiian Home Lands such as the definition utilized in the *Rural Radio Order*. As discussed earlier in this response, the United States has acknowledged its trust responsibility to Native Hawaiians in statute and in litigation.¹⁴ The United States enacted the Hawaiian Homes Commission Act of 1921 for the purpose of rehabilitating native Hawaiians by reconnecting them to their lands. Hawaiian Home Lands, therefore, should be included in the definition of tribal lands.

CNHA supports the definition of tribal lands utilized in *Rural Radio Order* because it broadly applies to Native communities. The needs of Native communities go beyond those

¹⁴ Brief for the United States as Amicus Curiae Supporting Respondent, *Rice v. Cayetano*, 527 U.S. 1061 (1999) (No. 98-818) (“Congress has concluded that it has a trust obligation to Native Hawaiians.”) 1999 WL 569475 at *10.

geographically located on reservations as defined by the Commission in determining eligibility for the Lifeline and Link Up programs. The United States trust responsibility towards its indigenous people is not based on geography; rather, it is based on a historical political and legal relationship. Native communities have a critical need for broadband and the United States should ensure that its programs and efforts to address these needs include the maximum eligibility for Native communities. CNHA commends every effort made by the United States to increase Native communities' access to broadband communication.

VIII. Eligible Telecommunications Carrier Designations on Tribal Lands

The Notice of Inquiry seeks comments on a number of issues related to the designation of Eligible Telecommunications Carriers. CNHA does not have enough expertise on Eligible Telecommunications Carrier designations to comment on all of the areas suggested by the Federal Communications Commission. CNHA does, however, believe strongly that Hawaiian Homestead Associations must be consulted when an ETC is seeking designation for an area that impacts a Hawaiian homestead community. Consultation with the Department of Hawaiian Home Lands should not suffice as consultation with Hawaiian homestead beneficiaries.

IX. Public Safety and Homeland Security

The Notice of Inquiry seeks comment on public safety communications. CNHA supports federal programs and policies designed to improve access to emergency services and communications in native communities. Given Hawaii's unique history and geographic isolation, emergency services and communications are provided by federal, state, and local governments on Hawaiian Home Lands. Most challenges associated with emergency communications and interoperability

have to do with geographic isolation and are coordinated between the county, local, and state governments with jurisdiction over Hawaiian Home Lands.

X. Consultation and coordination with Native Nations

The Notice of Inquiry seeks comments on how the Commission can structure a consultation process that is most productive and efficient. CNHA applauds the Commission for its creation of the Office of Native Affairs and Policy. Such action demonstrates that the Commission understands the challenges facing native nations and that it is committed to finding appropriate solutions in a manner that involves native nations and native leaders.

For projects on Hawaiian Home Lands, it is imperative that consultation include Hawaiian Homestead Associations as they are self organized democratically elected bodies made up of, and representing, the Native Hawaiian people living on Hawaiian Home Lands. Far too often, federal policymakers confer only with the state DHHL; and mistakenly believe that by doing so they have consulted with Hawaiian homestead beneficiaries. Consultation can also be coordinated directly with the Hawaiian Homestead Associations or, alternatively with the Sovereign Councils of the Hawaiian Homesteads Assembly (SCHHA). SCHHA is a statewide organization of 30 homestead associations that was established in 1987 to provide lessees living on Hawaiian homelands with a unified way in which to (1) advocate for the protection of the Hawaiian Homes Commission Act of 1921 as amended and the land trust that the act established and (2) to provide input into decision making that impacted their continued residence on the land.

Consultation with Hawaiian Homestead Associations should occur at least once a year, by teleconference or in person. For far too long HHCA beneficiaries have lacked a seat at the table and, therefore, the opportunity to provide input on policies to address their specific needs in their communities, and to share the ingenuity of leaders that are most knowledgeable about the land and its people. The federal trust relationship is between the beneficiaries themselves and the federal government and while it can be facilitated by the state DHHL, contact with the Department should not serve as substitute for contact with the Hawaiian Homestead Associations.